

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1450

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1450

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM LACEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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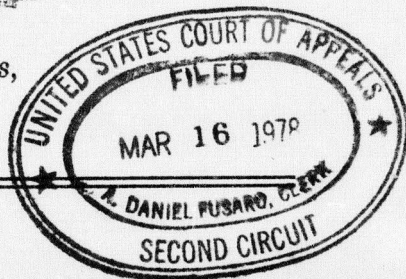


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—v.—

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Lacey appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 7, 1977, after a six-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 77 Cr. 210 was filed on March 25, 1977, in four counts. Count One charged Lacey, Richard Paglialonga, Edward White, Ilene Baker and Milton Thompson, a/k/a "Skip," with conspiracy to import, to distribute, and to possess with intent to distribute, cocaine, in violation of Title 21, United States Code, Sections 846 and 963. Count Two charged Lacey and Thompson with possession with intent to distribute of approximately one-half pound of cocaine in January, 1976, in violation of Title 21, United States Code, Sections 812, 841(a) and

841(b)(1)(A), and Title 18, United States Code, Section 2.*

Trial of Paglialonga, Lacey and Baker commenced on July 20, 1977 before the Honorable Charles L. Brieant, Jr. and a jury.** On July 26, 1977, at the close of the Government's case, Judge Brieant granted Lacey's motion pursuant to Fed. R. Crim. P. 29 for a judgment of acquittal on Count One. Later on July 26, 1977, during questioning of a witness called by Paglialonga, Judge Brieant granted Lacey's motion for a mistrial on Count Two, based on prejudicial testimony elicited by Paglialonga's attorney as part of his defense.***

Retrial of Lacey on Count Two commenced before Judge Cannella and a jury on September 14, 1977, and ended on September 21, 1977, when the jury found Lacey guilty. On November 7, 1977, Judge Cannella sentenced Lacey to a term of incarceration of two and one-half years, to be followed by a special parole term of three years.

Lacey is enlarged on bail pending appeal.

* Lacey was named as a defendant only in Counts One and Two. Count Three charged Paglialonga with possession with intent to distribute of approximately four ounces of cocaine in January, 1976, and Count Four charged White with possession with intent to distribute of approximately 70 pounds of marijuana in the form of hashish on February 1, 1977, in violation of 21 U.S.C. §§ 812, 841(a)(1), and, respectively, 841(b)(1)(A) and 841(b)(1)(B).

** White was arrested on February 1, 1977, but became a fugitive before the indictment was filed and remained a fugitive at the time of trial. Thompson never has been apprehended.

*** On July 27, 1977, the jury found Paglialonga guilty on Count One, not guilty on Count Three, and Baker not guilty on Count One. On September 30, 1977, Judge Brieant sentenced Paglialonga to incarceration for two and one-half years, to be followed by three years of special parole. On February 6, 1978, Paglialonga's conviction was affirmed without opinion by this Court, *United States v. Paglialonga*, Dkt. No. 77-1432.

Statement of Facts

A. Synopsis

The evidence established that William Lacey successfully obtained for distribution six ounces of cocaine after it had been smuggled into the United States by others as part of an illicit shipment from Lima, Peru. Through the testimony of Richard Paglialonga, Harvey Cohen and Marsha Renee ("Marney") Brown,* the Government proved that these three conspired to smuggle more than one pound of cocaine into the United States, only to lose six ounces of the drug to two men who exacted the cocaine from Cohen at his apartment by threats of violence. Cohen and Brown independently identified William Lacey as one of the men who had taken the cocaine.

In defense, Lacey stressed factors which he argued undercut the credibility of Cohen and Brown—their lack of candor during their "cooperation" with State and Federal authorities, their motive to fabricate in the hope of winning leniency, and their extensive background in the drug culture.

* At the time of his testimony, Paglialonga was awaiting sentence on Indictment 77 Cr. 210. Cohen and Brown had been arrested by officers of the New York Drug Enforcement Task Force on August 10, 1976 and charged with A-I felonies in the Special Narcotics Court of the State of New York. On February 25, 1977, Cohen and Brown were permitted to plead guilty to an A-III felony after assisting the New York Drug Enforcement Task Force in several undercover investigations and testifying before a federal grand jury in connection with this case. On the same day, Cohen and Brown were sentenced to lifetime probation.

B. Government's Case

1. The Peruvian Cocaine-Smuggling Venture

In late August, 1975, Richard Paglialonga travelled to Lima, Peru, where he met Marney Brown and a man whose name he recalled only as "Edward." (Tr. 262-C3; GX 29A).^{*} According to Paglialonga, one day police came and took Edward away, apparently for narcotics-related activities. (Tr. 266). After Edward's removal, Brown opened her suitcase, showed Paglialonga two or three packages of white powder, and asked Paglialonga what she should do with it. (Tr. 266-67, 280-81). Paglialonga took the powder, which weighed about a pound, wrapped it in a towel, and obtained a ride to the beach. (Tr. 267, 281-282). Paglialonga then buried the substance on the top of a cliff at the beach. (Tr. 264-65). On September 10, 1975, Paglialonga returned to Los Angeles from Lima, leaving the white powder in its sandy hiding-place. (GX 29A).

In late December, 1975, Paglialonga and Cohen travelled from New York to Lima. (Tr. 267-68, 132-48; GX 27A, 29A, 73). Paglialonga revisited the cliff and dug up the towel, which still contained the packages of white powder. Paglialonga then concealed the packages of white powder in a tennis racket cover (Tr. 136, 283), and later, with Cohen, hid the powder inside the lining of a brown leather suitcase which belonged to Paglialonga. (Tr. 138, 144-48; GX 4). Cohen and Paglialonga went

^{*} In this brief, references to the trial transcript, Government exhibits, appellant's brief and appellant's appendix are abbreviated as "Tr.," "GX," "Br.," and "A.," respectively.

Paglialonga testified only after Judge Cannella signed an order granting him use immunity under 18 U.S.C. §§ 6002-6003. Paglialonga's attorney refused to permit the Government to interview his client, and Paglialonga acknowledged on the stand that he had never discussed his testimony with anyone from the United States Attorney's Office. (Tr. 260).

from Lima to Guayaquil, Ecuador; from Guayaquil, to Quito, Ecuador. From Quito, Paglialonga travelled to Curacao via Caracas, where he rejoined Cohen, who flew directly to Curacao from Quito. (Tr. 139, 269; GX 27A, 29A). Cohen carried the powder-laden suitcase from Lima to Curacao. (Tr. 138, 283). In Curacao, Cohen and Paglialonga met Ilene Baker. As pre-arranged, Baker and Cohen switched suitcases, and Baker carried the suitcase containing the white powder from Curacao to New York. (Tr. 140-43, 269). Cohen accompanied Baker on the first leg of a Curacao-New York flight on January 8, 1976, disembarking at Aruba. On January 10, 1976, Paglialonga left Curacao on a flight bound for New York. Cohen boarded the plane at Aruba, and the two men completed their journey to Cohen's apartment at 39 Jane Street, New York, New York, together. (Tr. 143; GX 27A, 29A).

On returning to New York, Cohen found the brown suitcase in his apartment. (Tr. 147). Cohen opened the bag and saw that it had been emptied of clothing and other personal effects. (Tr. 180). Cohen immediately ripped out the linings and discovered the bags of cocaine. (Tr. 149, 181; GX 3B, 3C, 3D). Upon tasting the white powder, Cohen noted the taste of cocaine. (Tr. 150). Cohen proceeded to separate the cocaine into one-ounce quantities for distribution, which he and Brown sealed into 16 or 17 clear plastic bags. (Tr. 150, 186). Somewhat less than half an ounce of cocaine was left after the one-ounce bags had been weighed and sealed. Cohen sealed the left-over quantity into a plastic bag and put the packages of cocaine into a leather bag, which he hid in a closet. (Tr. 151, 186; GX 3A).

2. The Theft of the Cocaine by Lacey and "Skip"

The day after he packaged the cocaine, Cohen received a call about the cocaine from a man known to him only as "Billy." "Billy" was an associate of Edward

White's—presumably the "Edward" arrested by the Peruvian police during Paglialonga's visit to Peru in August, 1975—whom Cohen and Brown had met briefly on one occasion about a year earlier. (Tr. 15, 151-52, 165). After the call, Cohen divided the cocaine into two packages and returned the packages to the closet. (Tr. 152, 188).

Not long after his call, Billy, who later was identified as the defendant, William Lacey, came to Cohen's apartment with another man. (Tr. 17). Lacey introduced his companion as "Skip." (Tr. 157). Skip had a glass eye. (Tr. 156). Lacey sat at a coffee table in the living room with Cohen and Brown. (Tr. 18, 157). Skip stationed himself by the door to the apartment. (Tr. 157).

Lacey, Cohen and Brown were joined at the coffee table by Paglialonga, who came down from the upstairs area of the apartment. (Tr. 272). Lacey first accused Paglialonga of being someone from California who had "ripped him off" on a prior occasion. (Tr. 18, 159, 274).^{*} Lacey then announced to Cohen, Brown and Paglialonga that he *knew* they had just been to South America and had brought back cocaine. (Tr. 158). Cohen replied that Edward, who had proposed the trip and planned the itinerary, had promised Cohen and his people a fee for retrieving the cocaine. Lacey said that he had spent a substantial amount of money to obtain Edward's release from jail in South America and asked for a quantity of cocaine as reimbursement for his expenditures. (Tr. 158). Lacey backed up his demand with the threat that Skip, whom he said was a deaf-mute, would react violently if Lacey gave an appropriate hand signal. (Tr. 19). Billy and Skip each drew one gun; in addition,

^{*} "Billy" later retracted the accusation. (Tr. 159).

Brown and Cohen observed that each of the visitors was armed with a second weapon. (Tr. 18-19, 158-59).*

In response to the threats, Cohen went to his closet and brought back six or seven ounces of cocaine. (Tr. 162, 163). To explain the relatively small quantity of cocaine which he displayed, Cohen falsely asserted to Lacey that one bag of cocaine had been punctured by a rock and ruined by moisture while buried in Peru. (Tr. 187, 189). The cocaine was spread on a mirror, and Lacey and Cohen sampled the powder. (Tr. 162).** Lacey said the cocaine was "Okay," took the cocaine, and he and Skip left the apartment (Tr. 163).***

A day or so later, "Billy" called Cohen and told him that one of the one-ounce packages was "light." Cohen agreed to exchange it for a full ounce. (Tr. 166). Lacey alone later came to Cohen's apartment and handed Cohen a plastic bag. A piece of masking tape on the bag bore

* Paglialonga corroborated significant aspects of the account of Lacey's visit given by Brown and Cohen: the visit was paid by two men, at least one of whom was white (Tr. 291); an accusation of a theft was made against him by one of the men and later withdrawn (Tr. 274); the cocaine was shown and sampled (Tr. 278); and ownership of the cocaine was the primary topic of the meeting. (Tr. 273-74). He testified, however, that he did not hear any names mentioned (Tr. 277) and did not see any weapons displayed. (Tr. 278). Paglialonga was unable to identify Lacey as one of the men involved in the theft. (Tr. 292).

** Cohen testified that he and "Billy" had "snorted" the cocaine. (Tr. 162). Paglialonga testified that the men had placed the powder on their index fingers and tasted it. (Tr. 278).

*** Later that evening, the remaining cocaine was brought out and Cohen, Brown and Paglialonga discussed its allocation. (Tr. 193).

the notation "11½." (Tr. 167; GX 3A). Cohen gave Billy a full ounce, and Lacey left.*

3. The Pre-trial and Trial Identifications of William Lacey as "Billy"

Following her arrest and agreement to cooperate, on February 15, 1977, Brown was shown 12 photographs of young white men, stapled to a piece of cardboard, by Detective DeRosa. (Tr. 33; GX 6). Brown identified the photograph of William Lacey as "Billy" and the photograph of Milton Thompson as "Skip." (Tr. 34). Cohen was then shown the array of photographs and asked if he recognized anyone in the collection. (Tr. 171; GX 6). Cohen, too, independently identified Lacey as "Billy" and Thompson as "Skip." (Tr. 171-72).**

* On February 4, 1976, Cohen sold one of the five ounces of cocaine which he and Brown had kept as their compensation for participating in the smuggling venture to John DeRosa, an undercover detective with the New York Drug Enforcement Task Force, for \$1900. (Tr. 44, 72, 94, 167-68, 198; GX 1). On February 6, 1976, Cohen sold Detective DeRosa the remaining four ounces for \$7600. (Tr. 44, 72, 94, 167-68, 198; GX 2). These sales, and other later transactions, led to the arrest of Cohen and Brown on August 10, 1976.

** Lacey moved before trial to suppress the pre-trial identifications of him by Brown and Cohen. The circumstances surrounding the showing of the photospread were thoroughly explored at a hearing held on Lacey's motion on May 5, 1977, at which Detective DeRosa testified (Tr. of May 5, 1977, pp. 4-42) and the defense interviewed, but chose not to call, Brown and Cohen. (*Id.* pp. 42-49). On July 7, 1977, Judge Cannella denied the motion to suppress with the following memorandum endorsement: "There being absolutely no evidence of suggestiveness made in the photographic identifications in this case, defendant Lacey's motion to suppress evidence concerning such identifications is hereby denied." This ruling is not questioned on appeal.

Brown and Cohen both identified Lacey in open court at trial as the "Billy" who had taken cocaine from them in January, 1976. (Tr. 34, 173).

Police Officer William Minett testified that he observed William Lacey in the company of Milton "Skip" Thompson, who had a false right eye, in New York City on February 19, 1976. (Tr. 340-41).^{*} Minett made an in-court identification of Lacey and identified as photographs of Lacey and Thompson the two photographs contained in the photospread which both Brown and Cohen had selected. (Tr. 340, 341-42; GX 6).

C. Defendant's Case

The defendant did not present any evidence.

A R G U M E N T

POINT I

The District Court's Supplemental Instructions and Decision to Permit the Jury Deliberations to Continue Did Not Coerce a Verdict.

Lacey argues that various actions by the trial judge during the jury deliberations had the effect of coercing

^{*} A mid-trial hearing revealed that on February 19, 1976 Officer Minett had participated in the arrest of Lacey, Thompson, and Lacey's wife. The arrest occurred after a car driven by Lacey had side-swiped a parked Chevrolet Vega, which had two occupants, on South Street in lower Manhattan. (Tr. 227-28). In the ensuing chase, Minett saw Thompson throw two guns from the car. (Tr. 228-29, 231). The District Court sustained Lacey's objection to the Government's offer of the guns, which was made out of the presence of the jury, and carefully limited Minett's testimony so as to insure that the jury did not learn of the events leading to Minett's observation of Lacey in the company of Thompson. (Tr. 241-47, 338-42).

a verdict. The argument is based on the claim that the two *Allen* charges * given by Judge Cannella in response to the jury's deadlock notes included intrusive comments and omitted language designed to insure that no juror would sacrifice a conscientiously-held position in the interest of reaching unanimity. Lacey also asserts that the decision of the District Court to permit the jury to continue to deliberate on September 21, 1977 was coercive. These contentions are refuted by the record, which shows that the language of the two *Allen* charges—to which no objection was made—was fair and balanced, and that the trial judge did not abuse his broad discretion in regulating the length of the jury deliberations.

A short while after the jury began its deliberations, on Monday, September 19, 1977, the jury reported that it was "hopelessly deadlocked." (Tr. 425; Court Exhibit 7). Although Lacey immediately moved for a mistrial, the trial judge determined that the brevity of the deliberations—less than two hours of deliberation had occurred—made a different course of action appropriate. After advising counsel of his intentions, Judge Cannella gave the jury an *Allen* charge, suspended the deliberations until the next day, and excused the jurors for the evening. No objection was made by defense counsel to the language of the *Allen* charge which was employed.**

The next day, September 20, 1977, after approximately three and one-half hours of additional deliberation, the jury reported that it was unable to reach a verdict. The defense again sought a mistrial, but the

* *Allen v. United States*, 164 U.S. 492 (1896).

** Before the first *Allen* charge was given, Lacey did express an objection to Judge Cannella's summary of the charge to the extent that it included a representation that the case would necessarily be tried again. Judge Cannella readily complied with Lacey's request that the jury be told only that "the case *may* be tried again." (Tr. 428-29).

trial judge decided that the deliberations still had not taken an excessive length of time and that repetition of the *Allen* instructions given the day before was appropriate. The court repeated the modified *Allen* charge, again without objection from the defense to the wording of the charge. After an hour of additional deliberation, the jury sent out a note requesting additional information.* Nothing further was heard from the jury on the afternoon of September 20, 1977, and at 5:10 P.M. the District Court excused the jury for the day, with the instruction that the jurors return for further deliberations the following morning. (Tr. 451). The jury resumed its deliberations at about 10:00 A.M. on September 21, 1977 and at about 11:50 A.M. announced its verdict of guilty.

With the background of the jury deliberations in mind, we turn to Lacey's appellate claims. Lacey argues that two remarks by the District Court during its first *Allen* charge were improper and that both charges failed to caution the jurors against abandoning a conscientiously-held position. Since Lacey made no such objections to the substance of either *Allen* charge in the District Court, he is precluded from asserting these claims on appeal. Fed. R. Crim. P. 30; *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977); *United States v. Araujo*, 539 F.2d 287, 291 (2d Cir. 1976).

* The note stated that the jurors wished (1) to see the exhibits containing cocaine in order to make a comparison between the full ounce packages sold to Detective DeRosa and the "short weight" package and (2) to know when the short weight package had been seized. (Tr. 446; Court Exhibit 11). The first ounce of cocaine sold to Detective DeRosa was passed to the jury, and Judge Cannella informed the jury that the short weight package was empty so no comparison could be made. (Tr. 448-49). The court told that jury that the short weight package had been seized on August 10, 1976. (Tr. 449).

Even if Lacey's claims are evaluated on their merits, moreover, consideration of the entire record shows that Judge Cannella's instructions were not coercive.

The two remarks of which Lacey complains were made during the first *Allen* charge: Judge Cannella observed that the simple issue presented for the jury was whether "you . . . believe the Cohens and the Browns" or "you believe the fact that the case has not been proven beyond a reasonable doubt" (Tr. 430); at another point in the charge, the District Court commented that an instruction regarding the deference owed by majority jurors to minority views was "repetitious." (Tr. 431). Lacey's criticism of these comments lifts the allegedly prejudicial remarks completely out of context and exaggerates their significance and impact beyond all reasonable proportion.*

* The first *Allen* charge administered by the District Judge was as follows:

"I have a note which reads or maybe I should have said that I had a note. Here it is.

We are hopelessly deadlocked, and it is signed by the foreperson. I want to compliment the jury for the serious manner in which you are attending to your chores in this case. I will indicate to you just as a trivia matter that I have been in this business for about 29 years, fifteen years in the State court and fourteen years here in the Federal Court. I have been dealing with juries during that time. It is not unusual for a jury to feel that they have reached the end of the road. In this case, which is essentially a very simple case your duties are really simple in nature, although they may be hard to perform. There is essentially, in the case, a very serious question of fact which must be decided by you. I suppose in a layman's terms you would say well you either believe the Cohen's and the Brown's or you believe the fact that the case has not been proven beyond a reasonable doubt. I can understand the note coming in. But you realize that you have only been out less than two hours on a case that's taken a number of days to try.

[Footnote continued on following page]

It is difficult to understand how the "reasonable doubt" remark was in any way prejudicial to Lacey since it echoed the thesis stressed by his attorney in summation (*see, e.g.,* Tr. 386, 388-90) and was so generalized as to be applicable to the deliberations in almost any criminal case. The "repetitious" statement came during the trial judge's explanation of the principle that all jurors should

In the large number of cases absolute certainty can not be expected, although the verdict must be the verdict of each individual juror and not merely acquiescence in the conclusion of others, yet you should examine the question submitted with proper regard and of deference for the opinion of others.

You should listen to each other's opinions with a disposition to be convinced.

It is your duty to decide the case if you conscientiously can do so. If a much larger number of jurors favor conviction, a dissenting juror should consider the reasonableness of his doubt when it makes no impression upon the minds of the other jurors, equally intelligent and impartial and who have heard the same evidence and taken the same oath.

If, on the other hand, the majority favors acquittal the minority should ask themselves whether or not they might not reasonably doubt the correctness of their judgment.

Likewise the jurors in the majority faring a finding for either party should ask themselves whether they might not reasonably doubt the correctness of their judgment when it makes no impression upon the minds of the minority jurors.

That is repetitious. If you should fail to agree on a verdict, the case may be retried. Any future jury that may be selected must be selected in the same manner and from the same source as you have been chosen. There is no reason to believe that the case would ever be submitted to twelve men and women more competent to decide it than you, or the case can be tried any better or more exhaustively than it has been tried here already or that more or clearer evidence could be produced on the behalf of either side. (Tr. 429-31).

consider carefully one another's opinions. Read in its first context, it is clear that the phrase did not detract Judge Cannella's careful statement of the duty of majority jurors to listen to the views of the minority, but merely emphasized that the majority's obligation was a logical outgrowth of the open and responsible deliberations which the jury was being asked to conduct. Neither of the disputed remarks was repeated when the second *Allen* charge was given the following afternoon. It cannot sensibly be argued that statements so remote in time from the verdict—which was not announced until two days later—had any coercive effect.

Lacey also asserts that both *Allen* charges were coercive because they failed to emphasize sufficiently the proposition that no juror should abandon a conscientiously-held position. Contrary to this belated claim, the *Allen* charge did cover the duty of a dissenting juror to his or her conscience and adequately explained in substance that a verdict should not be reached at the price of "abandoning without reason conscientiously held doubts." *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (*en banc*), *cert. denied*, 46 U.S.L.W. 3541 (February 27, 1978); *United States v. Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966). Judge Cannella instructed the jury in both *Allen* charges that "the verdict must be the verdict of each individual juror and not merely acquiescence in the conclusion of others." (Tr. 430, 445). The court instructed the jurors in its first *Allen* charge that they had a duty to decide the case, but only "if you conscientiously can do so." (Tr. 430). The second *Allen* charge emphasized that the jury's verdict should be "in conformity with your convic-

tions and your conscience." (Tr. 444).^{*} This language fully comported in substance with the modified *Allen*

^{*} The second *Allen* charge delivered by Judge Cannella was as follows:

"Members of the jury, in analyzing how long you have been deliberating in this case this morning, I asked you to come here about 9:30 if you recall, but we actually didn't get started until about quarter after ten. Someone was delayed. I never ascertained why because I didn't think it was important. You then went out to lunch around one o'clock and you returned after two. When I got this note it was about 2:35. Actually you have not been out that long today. So I feel that you should continue to discuss this case with the hopes of coming up with a verdict that's in conformity with your convictions and your conscience. I am going to repeat what I said to you yesterday when you left, because of the interval in time, to refresh your recollection as to this particular area.

In the large portion of cases absolute certainty can not be expected, although the verdict must be the verdict of each individual juror and not mere acquiescence in the conclusion of others. Yet you should examine the question submitted with proper regard and deference to the opinion of each other and you should listen to each others opinion with a disposition to be convinced. It is your duty to decide the case if you can conscientiously do so.

If a much larger number of jurors favor conviction a dissenting juror should consider the reasonableness of his doubt when it makes no impression upon the mind of the other jurors equally intelligent and impartial and who have heard the same evidence.

If, upon the other hand, the majority favors acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of their judgment.

Likewise the jurors in the majority favoring the finding for either party should ask themselves whether they might not reasonably doubt the correctness of their judgment when it makes no impression upon the minds of the minority jurors, who, as I have indicated before, are equally intelligent and impartial and have heard the same evidence.

Should you fail to agree in this verdict that is not the end of the case. It may be retried. And any future

[Footnote continued on following page]

charge repeatedly approved by this Court. See, e.g., *United States v. Robinson*, *supra*; *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), *cert. denied*, 46 U.S.L.W. 3215 (1977); *United States v. Bermudez*, 526 F.2d 89, 99-100 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974); *United States v. Jennings*, 471 F.2d 1310, 1313-14 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States v. Birrell*, 447 F.2d 1168, 1173 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972); *United States v. Kenner*, *supra*.*

Finally, Lacey's contention that the *Allen charges* were coercive is belied by the record of the jury's deliberations. The first *Allen* charge did not result in a verdict, but in several hours of additional, purposeful deliberations and a second deadlock announcement. In response to the second *Allen* charge, the jury conscientiously resumed its deliberations, sought a review of additional evidence, and did not reach a verdict until late in the morning of the day after the charge was repeated. These

jury must be selected in the same way you were selected from the same source of jurors that you have been selected and there is no reason to believe that the case would ever be submitted to twelve men and women who are more competent to decide it than you or that the case would be tried any better or exhaustively than it has been tried here or that there is any more or clearer evidence that could be produced on behalf of either side.

For that reason I suggest to you that you give it further consideration and I thank you for doing that as I have thanked you for what you have done in the past." (Tr. 444-46).

* In addition, in his original charge Judge Cannella told the jury that "you will make your judgment in this case and it is an individual judgment based upon your conscience and the law and the evidence as you see it." (Tr. 421).

facts show that "the jury had received the court's instruction to continue in a responsive manner and was deliberating in a responsible and conscientious fashion," *United States v. Rodriguez, supra*, 545 F.2d at 831. Indeed, here as in *Robinson*, the continuation of deliberations for a substantial period after the *Allen* charge was given provided forceful evidence that the balanced charge was not coercive in effect.*

The remaining point pressed by Lacey stems from the decision of the District Court to continue deliberations on September 21, 1977. In a colloquy on the afternoon of September 20, 1977, after receipt of the second deadlock note and before repetition of the *Allen* charge, Judge Cannella asked the Government to state its position as to how long the deliberations should be permitted to continue. (Tr. 442). The prosecutor replied that he would not continue deliberations "beyond the end of the day." (Tr. 443). Judge Cannella then stated that if a verdict was not reached by 5:00 P.M., he intended to declare a mistrial. After hearing a re-reading of the *Allen* charge, however, the jury sought additional evidence and

* To the extent that Lacey argues that the giving of two *Allen* charges was error in and of itself, the claim must be rejected. In *Robinson*—to which Lacey refers only by citing the dissent—this Court *en banc* rejected the contention that the administration of a second *Allen* charge is "error *per se*," adopting instead a rule requiring "an individualized determination of coercion." 560 F.2d at 517. Apart from his untimely attack on some of the language in the *Allen* charge, Lacey does not demonstrate any basis for finding coercion in the charge. Moreover, the jury in this case, unlike the juries in *Robinson* and *United States v. Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969), never disclosed the nature of its division. The *Allen* charge thus could not possibly have been viewed by the minority jurors as a tacit expression of support by the trial judge for a particular result.

at the end of the day obviously was still deliberating conscientiously and productively. Judge Cannella therefore decided that resumption of deliberations on September 21st might well be fruitful and declined to declare a mistrial, which would have led to yet a third trial of this case.

Lacey now suggests that it was somehow coercive of a verdict for the trial judge to have changed his mind about the length of deliberations in response to developments which indicated renewed progress toward a final unanimous verdict. The mere statement of defendant's contention demonstrates its absolute lack of merit. The discussion in which Judge Cannella considered placing a time limit on the deliberations occurred outside the presence of—and was never made known to—the jury. Failure to adhere to the deadline thus could have had no conceivable impact on the actual process of jury deliberations. Moreover, the time limit originally suggested by the Government—and presumably that set by the District Court as well—was premised on the continued inability of the jury to engage in meaningful deliberations. That condition never occurred since a note was received from the jury calling for a further review of the evidence and no report of deadlock had been received when the time came for suspension of the day's deliberations. In light of these intervening developments, which strongly suggested that continued deliberations on September 21st might be fruitful, continuation of the deliberations surely was not an abuse of discretion. *United States v. Sonnenschein*, 565 F.2d 235 (2d Cir. 1977) (18 hours of deliberations following a trial no longer than that in the case at bar); *United States v. Mimieri*, 303 F.2d 550 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962); *United States v. Olweiss*, 138 F.2d 798 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944); *United States v. Novick*, 124 F.2d 107 (2d Cir. 1941) *cert. denied*, 315 U.S. 813

(1942); *United States v. Commerford*, 64 F.2d 28, 31 (2d Cir.), cert. denied, 289 U.S. 759 (1933).*

POINT II

The District Court Properly Refused to Admit Into Evidence Portions of *The Amphetamine Manifesto*.

Lacey claims that Judge Cannella erred in refusing to admit into evidence, during the cross-examination of Brown and Cohen, excerpts from *The Amphetamine Manifesto*, a book Cohen published in 1972. The excerpts offered while Brown was on the stand reflected Brown's use of cocaine, heroin, peyote, and drugs in general. (Tr. 104; *The Amphetamine Manifesto*, pp. 28, 92, 144; A. 60, A. 61, A. 66). The excerpts offered during cross-examination of Cohen described his use of methedrine, methadone, "speedball" (a combination of amphetamine and heroin), and LSD. (Tr. 212-14; *The Amphetamine Manifesto*, pp. 6-7, 9, 100, 108, 113; A. 55, A. 56, A. 62-64). An examination of the record and an analysis of the material offered reveals that there simply was no proper basis for admission into evidence of this disputed material and that the trial judge properly excluded the book.

* Statements by defense counsel made it clear that the mistrial motions made during the jury deliberations were inspired by the hope that if a hung jury resulted, the Government would be dissuaded from pursuing the case. (Tr. 429). The District Court's rejection of that tactic—by denying the mistrial motions, continuing the jury deliberations, and utilizing a modified *Allen* charge to encourage the jurors to renew their efforts to reach a verdict if they could conscientiously do so—was neither coercive of the jury nor an abuse of discretion. *United States v. Martinez*, 446 F.2d 118, 120 (2d Cir.), cert. denied, 404 U.S. 944 (1971); *United States v. Hynes*, 424 F.2d 754, 757-58 (2d Cir.), cert. denied, 399 U.S. 933 (1970).

Lacey argues that portions of *The Amphetamine Manifesto* detailing prior drug experiences of Brown and Cohen were relevant to their general credibility. Contrary to Lacey's assertion, since neither Brown nor Cohen had been convicted of any crimes arising from their personal use of drugs, extrinsic evidence of such conduct was not admissible to impeach their credibility. F.R. Evid. 608(b)*; *Lewis v. Baker*, 526 F.2d 470, 475 (2d Cir. 1975); *United States v. DeSapio*, 456 F.2d 644, 648 (2d Cir.), cert. denied, 406 U.S. 933 (1972).

Lacey's contention that the excerpts from the book constituted prior inconsistent statements of Brown and Cohen is equally unpersuasive. Both witnesses freely admitted their use of drugs when questioned by Lacey during the broad cross-examination permitted by Judge Cannella.** Moreover, even assuming *arguendo* that the passages in question were inconsistent with Cohen's trial testimony, the inconsistency had nothing to do with the

* Rule 608(b) provides in part:

"Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."

** Before his first offer of the excerpts, Lacey established that Brown had used amphetamines on a daily basis until her arrest in 1976. (Tr. 99). Brown admitted that her use of amphetamines was an "addiction" and had caused hallucinations. (Tr. 99, 100). Brown revealed that she had used Valium "constantly," had used "acid," had injected herself with heroin, and that her exposure to drugs had been "extensive." (Tr. 98, 100, 101, 103). Indeed, Brown acknowledged having taken amphetamines on the day that Lacey and Skip came to her apartment. (Tr. 100). Similarly, Cohen admitted that he had used a wide variety of illegal drugs—marijuana, hashish, cocaine, amphetamines, LSD and heroin—whenever he could obtain them. (Tr. 206-07).

issues before the court and jury.* As Judge Cannella noted (Tr. 214), *The Amphetamine Manifesto* was published in 1972—five years before the trial, four years before the Peruvian cocaine-smuggling scheme and the other events at issue in the trial. The book was devoid of statements relevant to the facts of the case. Since nothing in the book showed that Cohen had a bias against Lacey, *United States v. Harvey*, 547 F.2d 720 (2d Cir. 1976), and the claimed “shading” of testimony which the excerpts arguably would have revealed was trivial at best, the exclusion of extrinsic proof on this collateral matter was well within the sound discretion of the District Court. *United States v. Stirling*, Dkt. Nos. 77-1140-41, 1144, 1177, 1178, slip op. 1401, 1455-56 (2d Cir., February 2, 1978); *United States v. King*, 560 F.2d 122, 128 (2d Cir.), cert. denied, 46 U.S.L.W. 3293 (1977); *United States v. Benson*, 548 F.2d 42, 47 (2d Cir.), cert. denied, 431 U.S. 939 (1977).

In any event, the District Court was vested with discretion to limit the introduction of extrinsic proof even if such proof pertained to a non-collateral issue in the case. *United States v. Blackwood*, 456 F.2d 526 (2d Cir.),

* The alleged inconsistency was premised on Cohen's testimony that he used amphetamines during one seven-month period for purposes of “research.” (Tr. 208). The “research,” Cohen testified, had led to publication of *The Amphetamine Manifesto*. (Tr. 209-10). Although Cohen's asserted motivation was to some extent substantiated by his having produced a published work, he acknowledged in response to questions from the court that he did not have authorization for the project and had obtained the drugs illegally. (Tr. 259-60).

Lacey never contended in the District Court that the Brown-related passages were admissible as inconsistent statements. In fact, Lacey never even asked Brown if the purported quotations in the book accurately reflected statements she had made. Nor did Lacey offer any other legal basis for admission of these excerpts. In the absence of even a suggestion of an inconsistency, the District Court clearly was correct in sustaining the Government's objection to these passages. *United States v. Martinez-Carcano*, 557 F.2d 966, 971 (2d Cir. 1977).

cert. denied, 409 U.S. 863 (1972); *cf. United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). When the material alleged to have been improperly excluded is considered in the context of the other impeachment material available to and used by the defense, it is clear that such discretion was properly exercised with respect to *The Amphetamine Manifesto*. *United States v. Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Pacelli*, 521 F.2d 1077 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). Brown and Cohen acknowledged extensive participation in drug-smuggling ventures and in multifarious forms of illegal drug use. Both admitted that they had faced charges in the Special Narcotics Court of the State of New York carrying maximum possible penalties of lifetime incarceration and thus had a powerful motive falsely to accuse others of involvement in their narcotics activities. The evidence also established that Brown and Cohen had lied repeatedly during the period of their cooperation.* The impeachment material that was presented to the jury thus was far more damaging to the credibility of Brown and Cohen than anything contained in the proffered portions of *The Amphetamine Manifesto*. Judge Cannella's finding that Lacey had "covered this drug scene more than

* To cite only one of a number of instances of untruthfulness on the part of Brown and Cohen which Lacey hammered home to the jury, Brown and Cohen, shortly after their arrest on August 10, 1976, expressed a desire to "cooperate" by revealing their cocaine source. (Tr. 48, 200-01). Yet Brown and Cohen falsely told the officers that Richard Connerty—their supplier for transactions with Detective DeRosa on April 1, 1976 and August 10, 1976—had also supplied the cocaine sold to the detective in February (Tr. 49-50, 202), a falsehood they maintained until January 7, 1977, when they revealed the visit by Lacey and Skip. (Tr. 82, 217). Even then, however, Brown and Cohen did not tell the entire truth. (Tr. 90). It was not until March 10, 1977—after Brown and Cohen had been afforded lifetime probation in exchange for their cooperation—that Brown and Cohen revealed the smuggling scheme and the part they played in it. (Tr. 203).

sufficiently" (Tr. 105) was correct, and his exclusion of the excerpts was a proper exercise of discretion.

POINT III

There Was Ample Evidence to Support the Jury's Finding That Lacey Possessed Cocaine.

Lacey's final point asserts that the evidence was insufficient to permit a jury finding that the substance Lacey took from Cohen, Brown and Paglialonga was cocaine. The argument overlooks much of the relevant evidence and ignores the compelling inferences which the jury could reasonably draw from the testimony and exhibits.

First, Cohen's testimony provided direct evidence of the nature of the pound of white powder which he, Paglialonga and Baker transported clandestinely from Lima to New York in late December, 1975, and early January, 1976. When Cohen in his apartment opened the suitcase which had been smuggled into the United States, he removed several clear plastic bags containing white powder, tasted the powder and found it to be cocaine. (Tr. 150). Cohen and Lacey also "snorted" the white powder on the evening that Lacey and Skip visited Cohen, Brown and Paglialonga and took a quantity of the powder from them. (Tr. 162). Lacey, who expressed at the outset his interest in obtaining *cocaine*, remarked that the substance was "Okay." (Tr. 163). Cohen's two samplings and Lacey's admission were sufficient, without more, to support the jury's conclusion that the white powder was cocaine. Fed. R. Evid. 701; Fed. R. Evid. 801(d)(2)(A); *United States v. Atkins*, 473 F.2d 308, 313 (8th Cir.), cert. denied, 412 U.S. 931 (1973); *Pennacchio v. United States*, 263 F. 66 (2d Cir.), cert. denied, 253 U.S. 497 (1920); cf. *United States v. Bermudez*, 526 F.2d 89, 97-98 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); *United*

States v. Cirillo, 499 F.2d 872, 888 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

Second, any possible doubt as to the fact that the powder possessed by Lacey was cocaine was removed by chemical analysis of no fewer than six items of physical evidence closely connected to the "powder" shipment. Three clear plastic zip-lock bags, seized from a shelf in Cohen's bedroom shortly after his arrest on August 10, 1976 (Tr. 297-98; GX 3B, 3C, 3D) were found to contain a residue of cocaine, as did a fourth clear plastic bag also seized in the apartment at the same time. (GX 3A). A piece of masking tape affixed to the fourth bag bore the notation "11½," which enabled Cohen to identify it as the bag returned by Lacey because it contained only 11½ grams, instead of an ounce.*

In sum, the evidence before the jury, viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), was more than sufficient to permit a reasonable mind to conclude beyond a reasonable doubt that the substance taken by Lacey was cocaine. *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir.

* Judge Cannella also received in evidence, as relevant to the issue of whether the powder was cocaine, the one ounce and four ounces of powder which Cohen sold to Detective DeRosa in February, 1976. (Tr. 113-17; GX 1, 2). Roger Godino, a forensic chemist employed by the Drug Enforcement Administration, testified that his laboratory analysis showed that the substances sold to Detective DeRosa were cocaine and that the same cutting agent, starch, was present in both the residue in the four plastic bags seized in Cohen's apartment and the cocaine sold to the detective. (Tr. 310, 316, 319).

1977)).* The jury's verdict should therefore be sustained.**

* Defendant's argument that since Cohen acknowledged obtaining cocaine from Richard Connerty the jury could not infer that the substance taken by Lacey and Skip came from the January Peruvian importation (Br. 17-18) is erroneous. Although Connerty was Cohen's source for sales or attempted sales of cocaine to Detective DeRosa in April and August, 1976, no part of the 16 or 17 ounces of cocaine Cohen had in his apartment in January, 1976, came from Connerty. (Tr. 70-72).

** Although the point is not clearly articulated in his Brief, to the extent that Lacey suggests that the evidence was insufficient to show that he took the cocaine with intent to distribute, the claim must be rejected. The relatively large amount of cocaine taken—at least six ounces, worth approximately \$12,000 at the prices Detective DeRosa paid Cohen—permitted the inference that Lacey acquired the cocaine, not for personal use, but for the purpose of resale. *United States v. Ramirez-Rodriguez*, 552 F.2d 883 (9th Cir. 1977) (inmate's possession of 13.7 grams of 30% pure cocaine and procaine worth \$2600); *United States v. Luciow*, 518 F.2d 298, 301 (8th Cir. 1975) (amphetamines worth \$15,000); *United States v. Echols*, 477 F.2d 37 (8th Cir.), cert. denied, 414 U.S. 825 (1973) (199 grams of cocaine); *United States v. Mather*, 465 F.2d 1035 (5th Cir.), cert. denied, 409 U.S. 1085 (1972) (197 grams of cocaine). In addition, of course, Lacey's statement that he was entitled to share in the fruits of the smuggling venture because he had provided bail money for White in Peru could reasonably be viewed as showing that his intent in taking the cocaine was to sell it and thereby recoup the funds assertedly expended on White's behalf.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN R. BENTLEY, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 16th day of MARCH, 1978,
he served a copy of the within brief by placing the same (2 COPIES)
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Allen R. Bentley

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Commission Expires March 30, 1979